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No. 82-1325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

I.A.M. NATIONAL PENSION FUND,
Petitioner,
v.

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S SUPPLEMENTAL BRIEF IN REPLY TO THE BRIEF FOR THE UNITED STATES

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The Solicitor General opposes our petition because the "limited . . . jurisdictional issue of reviewability of the trustees' decisions to include particular benefit eligibility provisions in their pension plans" (SG Br. at 9) does not, in his judgment, merit this Court's review. He is able to reach that conclusion, however, only by materially modifying petitioner's definition of the issue presented. He dismisses as "fact-bound" (*id.*) the quite distinct issue of reviewability *for reasonableness* which is at the heart of this case, even while implicitly acknowledging that the lower court's resolution of that issue was erroneous. We respectfully suggest that, correctly understood, the Solicitor General's views are not persuasive.

1. The issue presented by the petition is whether trustee-determined pension benefit eligibility rules which comply in every respect with the detailed minimum participation, vesting, benefit accrual, and fiduciary responsibility standards prescribed in ERISA may nevertheless be set aside by a district court if the trustees are unable

to persuade the court that those rules are, in the lower court's phrase, "necessary or reasonable." (Pet. App. 46(a)).[1] Because the court was not authorized to add any such amorphous, undefined standard to the "myriad obligations [ERISA imposes] on . . . trustees" (SG Br. at 14), the court exceeded its jurisdiction when it did so.[2]

Apparently unwilling directly to confront the "review for reasonableness" issue raised in the petition, the Solicitor General has redefined the issue in a way which avoids direct confrontation. By omitting from his definition of the issue presented (SG Br. at I) any reference to the "reasonableness" standard which is at the heart of this controversy, the Solicitor General is able to assert (*id.* at 9) that this case is "essentially limited to the jurisdictional issue of reviewability," and to recommend against review of *that* issue because "federal courts have jurisdiction to entertain an action charging a breach of [ERISA's fiduciary] duties" (*id.* at 15).

The argument is a classic straw man. It is not our contention that no judicial authority exists to correct trustee breaches of their fiduciary duties, or that "[*United Mine Workers Health and Retirement Funds v.*] *Robinson* [,455 U.S. 562 (1982),] should be read to limit the scope of Section 404" of ERISA (SG Br. at 14) in a way which infringes that authority. We *do* contend that Section 404

[1] The petition presents this issue in the form of two separate, but obviously related questions. The first, recognizing the exclusive reliance the court below placed on the line of cases construing LMRA § 302(c)(5), raises the issue of whether the "reasonableness" standard applied below conflicts with *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), while the second raises the issue of whether review for "reasonableness" is authorized by ERISA in the circumstances present here.

[2] "Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way *or the other* (emphasis added)." *Hagans v. Lavine*, 415 U.S. 528, 538 (1974); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888 (1st Cir. 1978).

is limited to its terms, and that those terms do not authorize the courts to impose, on an undefined, *ad hoc* basis, their own "concept of the best way to achieve the plan's aims" (*id.* at 9). The court below clearly held that it has the authority to do precisely that, and it is that holding which requires this Court's review.

2. The Solicitor General's assertion that no *Robinson* issue is presented by our petition (*id.*) is betrayed by his own analysis of that decision. He defends the court's conclusion that, because *Robinson* involved collectively-bargained, rather than trustee-determined eligibility rules, the *Robinson* analysis of the intended reach of LMRA § 302(c)(5) has no applicability to cases involving trustee-established rules. He makes no effort, however, to square that assertion with his recognition (*id.* at 10-11, 13-14) that Section 302(c)(5) is a criminal statute, the sole purpose of which was to prohibit diversion of trust fund assets to union purposes. He recognizes, indeed, as did this Court in *Robinson*, that "the goals of Section 302(c)(5) are fully satisfied so long as no diversion of employer contributions occurs" (*id.* at 13).[3] The Solicitor General does not explain how the criminal character and exclusivity of the nondiversion purpose of Section 302(c)(5) disappear when eligibility rules are set by trustees rather than collective bargaining parties. His self-defeated assertion that the Ninth Circuit might "reasonably conclude" (*id.* at 9) that Section 302(c)(5) also imposes "an undefined standard of reasonableness" on trustee-determined, but not collectively-bargained, rules (*id.* at 14), quoting *Robinson*, 455 U.S. at 574, is inexplicable.

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[3] In other circumstances, the Ninth Circuit has also recognized this nondiversion objective as the goal of Section 302(c)(5). *See, e.g.*, *Maxwell v. Lucky Construction Co.*, 710 F.2d 1395, 1398 (9th Cir. 1983):

> The congressional objective in enacting [LMRA] § 302 was to inhibit corrupt practices in the administration of employee welfare funds established through the collective bargaining process.

The Solicitor General alternatively asserts that, because the court of appeals ultimately "rested its jurisdiction on ERISA rather than the LMRA" (*id.* at 12), *Robinson* is, in any case, inapplicable here. That proposition, too, is untenable because, as the Solicitor General fully recognizes, the court in analyzing its authority under ERISA § 404(a)(1) drew exclusively upon what the Solicitor General describes, somewhat curiously, in light of his own understanding of the scope of § 302(c)(5), as "the well developed substantive law under Section 302(c)(5)" (*id.* at 8, n. 8). Given his recognition of that reliance, the Solicitor General ventures no explanation of how the validity of the court's extrapolation of § 302(c)(5) into § 404(a)(1) is to be assessed if not by exploring the correctness of the body of decisional law upon which the court relied. As to *that* essential question—whether the body of pre-ERISA Section 302(c)(5) law is, in fact, "well developed" or is, as the Solicitor General acknowledges (*id.* at 13-14), fundamentally flawed—*Robinson* clearly is controlling. The Solicitor General's demonstration (*id.* at 12) that numerous lower courts have continued, in common with the court of appeals, to disregard *Robinson* is graphic evidence that, his recommendation notwithstanding, the issue once again requires this Court's attention.

3. Implicit in the Solicitor General's assertion that *Robinson* has no applicability here is the suggestion that, without regard to how LMRA § 302(c)(5) ought correctly to be construed, ERISA § 404 independently authorizes court review, *for reasonableness*, of trustee determinations of benefit eligibility rules. In the Solicitor General's judgment, such uncabined judicial authority over trustee decisions "accords appropriate recognition to Congress' comprehensive purposes in enacting ERISA" (SG Br. at 9). He implies, moreover, that because ERISA is civil, not criminal, legislation, there is no need to define with particularity "the standard of conduct needed to" comply with its provisions (*id.* at 14). Be-

cause Congress has imposed "myriad obligations on employers and trustees respecting the manner in which pension and welfare benefit plans are established, administered and terminated" (*id.*), the Solicitor General illogically concludes that the courts must remain free to impose *additional* standards, more stringent than those specified in the statute, and improvised *ad hoc* whenever in a court's judgment such additional standards are necessary to render a plan of benefits reasonable.

The argument reflects, we submit, rather a strange approach to the task of statutory construction.[4] Insofar as it purports to reflect the policy goals of ERISA, moreover, the proposition that the purposes of ERISA require courts to engage in unrestrained, undefined case-by-case review to determine whether trustees' actions are reasonable represents, at best, a myopic assessment of those goals. Indeed, two such goals—the establishment of uniform substantive minimum standards and the preservation of the freedom of trustee decision-making—will be directly subverted if the decision below stands.

As the legislative history of ERISA demonstrates, the fiduciary responsibility provisions of that Act were intended, among other purposes, to

> bring a measure of uniformity in an area [i.e., fiduciary responsibility] where decisions under the same set of facts may differ from state to state.

H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 12 (1973); S. Rep. No. 93-127, 93d Cong., 1st Sess. 29 (1973). Congress recognized, moreover, as the Solicitor General apparently does not, that

> [t]he uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and

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[4] As this Court has often affirmed, *see e.g., City of Milwaukee v. States of Illinois and Michigan*, 451 U.S. 304, 317 (1981), "it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law."

> participants to predict the legality of proposed actions. . . .

Id. (both authorities).

Congress also recognized, as the Solicitor General apparently does not, that

> the legislative approach of establishing minimum standards and safeguards for private pensions is . . . consistent with the retention of freedom of decision-making vital to pension plans. . . .

H.R. Rep. No. 93-533, *supra*, at 9. The continued application of the construction of ERISA § 404(a) formulated by the court below and endorsed here by the Solicitor General is fundamentally at odds with the goals of certainty and uniformity of standards, and freedom of private decision-making within the bounds set by those standards, which Congress believed it accomplished in ERISA. So long as courts are permitted, under the facile "arbitrary and capricious" rubric,[5] to superimpose their own subjective judgments upon those carefully drawn by the Congress, trustees will never be able confidently to predict the legality of the benefit eligibility standards they have chosen, even when, as in this case, those standards fully comply with the detailed substantive minima set forth in the Act.

4. In his defense of the decision below, the Solicitor General points to ERISA's clear creation of judicial au-

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[5] In the line of § 302(c)(5) cases upon which the court relied, the terms "arbitrary and capricious" have long since lost any real meaning. They are now routinely used, as the Ninth Circuit's decision on remand in *Music v. Western Conference of Teamsters Pension Trust Fund*, No. 79-4251 (9th Cir. August 2, 1983) (copy reprinted in Appendix to Respondents' Second Supplemental Brief) attests, to describe any rule which, in the court's judgment, operates "unreasonably" against the interest of the participant who brings a challenge. "[W]e know [however] from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

thority "to enjoin any act or practice that violates the Act" (SG Br. at 16). Like the court of appeals, however, the Solicitor General finds it impossible to articulate what fiduciary duty petitioner's trustees breached. To be sure, he vaguely implies that reversal of the decision below would, in some unarticulated fashion, inhibit the courts' authority to compel trustee compliance with the statutory rules governing fiduciary responsibility (*id.* at 14-16). That red herring, however, serves only to obscure the real issue posed by our petition. The central question here is not whether ERISA empowers courts to remedy violations of the fiduciary responsibility provisions of the Act, which it clearly does. Rather, the question is whether the "solely in the interest" requirement of Section 404(a)(1), upon which the court of appeals and the Solicitor General rely, commands anything more than that trustees refrain from dealing with plan assets in the interests of persons *other than* participants and beneficiaries of the plan.

The court below read into Section 404(a)(1) an affirmative, albeit totally undefined obligation to deal "reasonably" *as among* participants and beneficiaries. The Solicitor General, conceding that there is no fiduciary obligation, either at common law or under ERISA, to treat "each beneficiary . . . identically" (SG Br. at 16, n.16), and acknowledging his doubt that "the burden of explanation" placed on the trustees by the lower court was authorized by ERISA (*id.*), inexplicably insists nevertheless that ERISA § 404(a)(1) conferred jurisdiction for the court to rule as it did.

The genesis of this fundamental error is, we suggest, not difficult to identify. It lies in the conceptual misapprehension of the nature of the fiduciary obligations imposed by ERISA § 404(a)(1). Both the legislative history of that section and the common law antecedents of the "solely in the interest" language upon which the court and the Solicitor General rely—sources, it must be noted, which neither the court below nor the Solicitor General

found it appropriate to examine—make clear that the standard of fiduciary conduct embodied in that phrase is prohibitory, not affirmative.[6] That is to say, Section 404(a)(1) *forbids* fiduciaries from dealing with the plan in their own interests, or in the interests of non-participant, non-beneficiary third parties. Absent fiduciary self-dealing, however, the "solely in the interest" phrase does not impose any substantive, affirmative standards governing allocation of benefits as among participants and beneficiaries.

Perhaps the most detailed explanation of the "solely in the interest" phrase in ERISA § 404(a)(1) originated with the Department of Labor. In an interpretive memorandum placed into the legislative record by Senator Javits, one of ERISA's principal sponsors in the Senate, the Department explained that, drawing upon the common law, ERISA would obligate a fiduciary

> to act *solely in the interest* of the participants and beneficiaries of the plan; *that is, to refrain from involving himself in situations* or transactions (especially transactions with known parties in interest) *where his personal interests might conflict with the interests of the participants and beneficiaries* for whom the fund was established (emphasis added).

119 Cong. Rec. 12076 (April 12, 1973).

We think this memorandum confirms beyond doubt that Congress understood the "solely in the interest" language in § 404(a)(1) to be a prohibition against self-dealing, and nothing more. Until the decision below, no court had imputed to Section 404(a)(1) the quite different "un-

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[6] The "solely in the interest" standard is a term which has acquired "accumulated settled meaning under . . . equity." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981). At common law, the phrase is shorthand for the duty of loyalty which the common law of trusts imposes on fiduciaries. Restatement (Second) of Trusts § 170(1) (1959). The duty of loyalty obligates fiduciaries not to engage in self-dealing with the trust. *Id.*

defined standard of reasonableness," *Robinson*, 455 U.S. at 574, which the lower court found.[7] The Ninth Circuit now routinely so construes that provision. *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983) ("We have implemented [ERISA § 404] with the 'structural defect' test. Under it rules that exclude employees from receiving benefits, for reasons which are arbitrary and capricious violate section 404"); *Music, supra* note 5. The Solicitor General's wistful suggestion that that court has sufficiently "clarified" its view of the scope of its power under Section 404(a)(1) (SG Br. at 16, n.16) has, moreover, now lost whatever questionable validity it might previously have had. For as the court's opinion in *Music* on remand makes abundantly clear, the Ninth Circuit still believes that ERISA § 404(a)(1) empowers federal courts to demand that trustees "come forward with evidence establishing the reasonableness of [any] eligibility requirement" (Resp. 2d Supp. Br. App. at 9a) whenever such a requirement "seems [to the court] unreasonable" (*id.* at 9a, 10a). In *Music*, moreover, as in this case, the court believed its open-ended mandate under Section 404(a)(1) included the authority to enjoin as "unreasonable" an eligibility rule specifically authorized by Congress, and to reject as "not persuasive" the very rationale upon which Congress relied (*id.* at 10a & n.10).

Unless the decision below is reviewed and reversed by this Court, lower federal courts will continue improperly

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[7] *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559 (N.D. Ohio 1978), and *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 103 S. Ct. 488 (1982), cited by the Solicitor General, nicely demonstrate this point. In both cases the courts found facts which demonstrated that the trustees had acted in the interests of a party other than a participant or beneficiary, and thus had violated the Section 404(a)(1) prohibition against self-dealing. In *Aurora*, the institutional interests of the union were served by exempting union members from a service credit cancellation applied to similarly situated non-members, while in *Bierwirth* the plan's assets were used—disadvantageously to the plan—to fight off a hostile takeover attempt aimed at the plan sponsor-employer.

to draw from ERISA § 404(a)(1) a broad, undefined power, never conferred by Congress, to review and modify pension plan benefit eligibility rules which comply in every detail with the statutory scheme Congress has devised.

The Solicitor General correctly notes (SG Br. at 8) that the decision below is the first appellate decision which relied on ERISA § 404(a)(1) as the source of authority to review pension eligibility rules for reasonableness. The question which this petition presents is, therefore, "an important one of first impression" (*American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964)). For these reasons, we again respectfully urge that this Court grant certiorari to decide "whether the Court of Appeals ha[s] gone too far in substituting its own judgment as to proper [benefit eligibility] practices in the case of a [pension benefit plan] which claim[s] the practices it ha[s] chosen [do] not violate [ERISA]." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 574 (1978).

Respectfully submitted,

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